No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.
an Oklahoma corporation,

Respondent.

On Writ Of Certiorari To The Court Of Appeals, Division I, For The State Of Oklahoma

BRIEF AMICI CURIAE OF THE CHOCTAW NATION OF OKLAHOMA AND THE CHICKASAW NATION IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF THE CHOCTAW NATION OF OKLAHOMA AND THE CHICKASAW NATION IN SUPPORT OF PETITIONER

The Choctaw Nation of Oklahoma and the Chickasaw Nation respectfully submit this brief *Amicus Curiae* in support of petitioner, The Kiowa Tribe of Oklahoma, in this case. Written consent to the filing of this brief has been obtained from all parties. The original letters authorizing this filing have been filed concurrently herewith.

INTEREST OF AMICI[1]

The Choctaw Nation of Oklahoma and the Chickasaw Nation are two of the larger federally recognized Indian tribes in the country. Prior to the allotment process at the turn of this century the area over which they governed covered most of southern Oklahoma. They continue to occupy and exercise tribal jurisdiction over thousands of acres within those historical boundaries.

Amici have an interest in this case because, under existing federal law, states have no authority to subject Indian tribes to coercive state court jurisdiction. Notwithstanding this longstanding prohibition, the Oklahoma Supreme Court has ignored settled federal law in several cases to carve out an unprecedented exception to tribal sovereign immunity. On July 9, 1997, the Chickasaw Nation was sued in the District Court of Tulsa County, Oklahoma in a case in which the plaintiff oil company

[1] Pursuant to Supreme Court Rule 37.6, Amici discloses that counsel for amici authored this brief in whole. No other person or entity, other than Amici, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

alleges it (oil company) "accepted" a contract in Tulsa County (off Chickasaw Nation Indian Country) to provide services and goods on Chickasaw lands and will surely rely on the Oklahoma court's misplaced decisions for jurisdictional purposes. Amici desire to be protected from this and future coercive state court jurisdiction against them and their economic enterprises.

Both tribes are heavily involved in economic activity where revenue is generated to fund needed governmental services to tribal members. These tribes have made significant strides in their federally encouraged goal of economic self-sufficiency and self-determination. For example, the Choctaw Nation has gaming establishments; manufacturing plants which provide defense materials to the U.S. Government and other products to the private sector; several truck stops and smoke shops which sell motor fuel and tobacco products which are taxed through compacts with the state. The Chickasaw Nation is also engaged in similar commercial activities. Subjecting Indian tribes to involuntary state court jurisdiction will place federal and tribal goals at serious risk.

Amici tribes file this brief to urge this Court to correct the confusion created by Oklahoma State Court decisions and to uphold the Court's unbroken and long line of decisions which hold, without exception, that states may not exercise jurisdiction over Indian tribes absent an express unequivocal waiver of immunity by the Tribe or an act of Congress.

SUMMARY OF ARGUMENT

Tribal sovereign immunity from unconsented suit is a fundamental element of federal Indian law from which this Court has never departed. In fact, the Court has consistently stated that this aspect of sovereignty can never be diminished without the consent of Congress or the Tribe.

Tribal immunity from suit is consistent with and essential to the federal government's policy of self-determination and economic development for Indian tribes. Such policies and tribal sovereign rights are governed entirely by federal law and may not be diminished by the States. Recent decisions of the Oklahoma Courts, such as the case at bar, present a threat to tribal sovereignty and infringe on tribal self-governance.

The States may not ignore the decisions of the federal courts on issues that are purely federal and governed by federal law. This decision, and others, of the Oklahoma Courts contravenes a long-standing and well-established policy enunciated many times by this Court and strictly adhered to by the lower federal courts. It should be reversed.

In conclusion, Amici will suggest there is a simple and valid solution to the concerns of the state court relating to business dealings with Indian tribes. Prior to engaging in a business transaction with the Tribe, the non-Indian party can require a valid waiver of immunity from suit. If the tribe declines, the other party should avoid dealing with it.

ARGUMENT

I. UNQUALIFIED TRIBAL SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT IS A BASIC PRINCIPLE OF FEDERAL INDIAN LAW

An elementary doctrine of federal Indian law is that an Indian tribe may not be sued in any court absent its express, unequivocal waiver of sovereign immunity or specific authorization by Congress. *Turner v. United States*, 248 U.S. 354, 358 (1919) ("Without authorization from Congress, the [Creek] Nation could not be sued in any court; at least without its consent); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)" ("These Indian Nations [Choctaw and Chickasaw] are exempt from suit without congressional authorization"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986) (" . . . in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states").

The most recent occasion this Court addressed this issue is in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) where the Court reaffirmed that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation". The

Court rejected the petitioner's proposal that it "modify the long-established principal of tribal immunity." (*Id.* at 511) The Court's refusal to modify came notwithstanding the fact " . . . sovereign immunity bar[red] the State from pursuing the most efficient remedy . . . " to collect taxes lawfully due it. (*Id.* at 514).

Citizen Band makes it clear that the Oklahoma Courts are misguided when they refuse to recognize sovereign immunity on the grounds that the Tribe was engaged in commercial activities with non-Indians.[2] *Puyallup* also stands for the proposition that tribal sovereign immunity applies to a tribe's commercial activities off of its Indian country. There, the Court reversed a judgment finding " . . . that the (state) court had jurisdiction to regulate the fishing activities of the tribe *both on and off* its reservation". (433 U.S. at 167) (Emphasis supplied)

II. PLENARY AND UNENCUMBERED CONGRESSIONAL CONTROL OVER TRIBAL IMMUNITY FROM SUIT IS ESSENTIAL TO THE FULFILLMENT OF THE CONGRESSIONAL TRUST RESPONSIBILITY

A "trust" responsibility between the federal political branches and the tribes has existed for over a century and a half. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); see also, e.g., *United States v. Mitchell*, 463 U.S. 206, 224-28 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The trust responsibility, *inter alia*,

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[2] There the Oklahoma Tax Commission was attempting to collect taxes on commercial sales to non-tribal members.

"define[s] the required standard of conduct for federal officials and Congress . . . ", and "is one of the primary cornerstones of Indian law". F. Cohen, *Handbook of Federal Indian Law* (1982 ed. at 220-21)

As a preliminary matter, it must be noted that pursuant to its trust responsibility, Congress has taken the field of tribal immunity from unconsented suit completely in hand. It has aptly and continuously demonstrated that it knows how to abrogate tribal immunity when it wants to. See, e.g., Act of June 28, 1898, ch. 517, § 2, 30 Stat. 495 (held to be a *limited* abrogation of tribal immunity in *Fidelity & Guaranty*, 309 U.S. at 513); Pub. L. No. 93-195, § 2, 87 Stat. 769 (1973) (*limited* abrogation of tribal immunity, applied in *Choctaw Nation v. Cherokee Nation*, 393 F.Supp. 224, 226-27 (E.D. Okla. 1975)). At the same time, its activities in the tribal immunity context have made it equally clear that, pursuant to its trust responsibility, it would abrogate such immunities only with great selectivity and care. *Thebo v. Choctaw Tribe*, 66 F. 372, 373-4 (8th Cir. 1895); Indian Self-Determination and Education Assistance Act. Pub. L. No. 93-638, tit. I, § 110, 88 Stat. 2213 (1975) (expressly preserving tribal immunity); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, § 203, 82 Stat. 73, 78 (codified at 25 U.S.C. § 1303) (permitting *habeas corpus* relief against tribe, but not constituting a general abrogation of tribal immunity from suit, see *Santa Clara Pueblo*, 436 U.S. at 59); H.R. 13329, 95th Cong., 2d Sess. (1978) (proposal for wholesale diminution of tribal sovereignty, rejected by Congress). Congress, indeed, takes its trust responsibilities seriously in the area of tribal immunity from suit.

In the context of the trust responsibility, a number of legal consequences flow from the preceding facts. First, as the Oklahoma Court long ago recognized, the federal plenary power over Indian affairs is "[f]ull; entire; complete; absolute; perfect; unqualified." *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okla. 1942). More particularly, federal statutes in the tribal immunity field, as was the case in the timber management field in *Mitchell*, "clearly give the Federal Government full responsibility" in the area. *Cf. Mitchell*, 463 U.S. at 224. As then-Judge Anthony Kennedy has written, "Indian tribes enjoy immunity because they are sovereigns predating the constitution, *and immunity is thought necessary to preserve autonomous tribal existence." United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981) (emphasis added) (citations omitted). If tribal immunity is to be diminished, it is for Congress, in the exercise of *its* trust responsibility, to make and effectuate that judgment.

Long ago, this Court, after a "careful review" of prior decisions, *United States v. Sandoval*, 231 U.S. 28, 46 (1913), stated:

> "Taking these decisions together, it may be taken as the settled doctrine of this court that *Congress*, in pursuance of the long-established policy of the Government, *has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts*, to determine when the true interests for the Indian require his release from [the guardianship]. (Emphasis supplied)

Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911). See generally *Haile v. Saunooke*, 246 F.2d 293, 297-98 (4th Cir. 1957) (citing case law between *Tiger* and 1957).

Contemporary case law in this Court has supported without deviation (on the merits) amicis' contention that deviations from the tribal immunity rule are for Congress, not the courts, to make. *Santa Clara Pueblo*, 436 U.S. at 58. Such a conclusion, premises considered, is essential to the ability of Congress to fulfill its trust responsibilities, unencumbered by inconsistent judicial applications. As will be noted in the immediately following section, both the federal executive branch and the Congress have, in recent years, vigorously promoted tribal self-governance, autonomy, and self-determination; such federal policies could easily be thwarted by attempted "runs on the tribal treasury" should the correlative, reinforcing, and equally vital congressional policy supporting tribal immunity (except as expressly[3] diminished by federal statute) be given short shrift by the state courts.

[3] A further consequence of the trust is that "courts presume that congress' intent toward [Indian tribes] is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, *supra* p. 7 at 221. Thus, federal abrogations of tribal immunity cannot be implied, but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58.

III. WITH RARE EXCEPTIONS NOT RELEVANT HEREIN, CONTEMPORARY CONGRESSIONAL AND EXECUTIVE POLICIES CONTINUE TO FAVOR BOTH TRIBAL SELF-DETERMINATION AND TRIBAL IMMUNITY FROM UNCONSENTED SUIT

"The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. And Congress in recent yeas has expressed a "jealous regard for Indian self-governance." *Id. See also, e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 & nn. 19-20 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 & n.17 (1983); Arrow, *Contemporary Tensions in Constitutional Indian Law*, 12 Okla. City U.L. Rev. 469, 474 n. 27 (1987).

The Executive Branch has been equally supportive. From the strong support provided tribal immunity in *Fidelity & Guaranty*, *see* Brief for the United States at 20-23, *Fidelity & Guaranty*, 309 U.S. 506 (No. 39-569), to the continued support provided to that doctrine in UNITED STATES DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW 492-94 (1958) (even though that "revision" of Felix Cohen's 1942 Handbook occurred during an "assimilationist" Indian policy era), the tribal immunity doctrine has not been questioned in that branch. More recently, Presidents Nixon, *see* 116 Cong. Rec. 23,258-62 (1970) and Reagan, *see* 19 Weekly Comp. Pres. Doc. 96-100 (Jan. 24, 1983), have strongly supported tribal autonomy, self-governance, and self-determination.

The federal government, of course, has not slavishly supported either tribal sovereignty, or, more particularly,

tribal immunity from suit during the last few decades. In the Indian Civil Rights Act of 1968, as has been noted, it authorized *habeas corpus* relief against Indian tribes (carefully balanced, it may be noted, by a tribal consent requirement for the future extension of state Public Law 230 jurisdiction, *see* 25 U.S.C. §§ 1323(b), 1326 (1982)), and it abrogated the tribal immunity of the Cherokee, Chickasaw, and Choctaw Nations in 1973 for the limited purpose of permitting the ascertainment of certain of those Tribes' rights *inter se*. Pub. L. No. 93-195, § 2, 87 Stat. 769 (1973). But those decisions – and the delicate judgments and balancing of the interests involved therein – are for the *Congress*, not the courts to make. *Amici* therefore respectfully submits that this Court should affirm its long-standing policy in adhering to the principle leaving issue-by-issue adjustments to the political branches, more particularly to the Congress, in the tribal immunity arena.

IV. FEDERAL INDIAN POLICY IS GOVERNED BY FEDERAL LAW AND MUST BE ADHERED TO BY THE STATE COURTS

State courts may not ignore or distort congressional policy and decisions of this Court on matters of federal law. However, against a virtual tidal wave of federal decisions and many from other state jurisdictions, Oklahoma's state courts have purported to carve out exceptions to the otherwise unqualified doctrine of tribal sovereign immunity based on whether the tribal activity occurred off Indian country and was commercial in nature.

The Oklahoma Supreme Court's unique revolution began in 1985 with *State, ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985) where the Court ordered a state trial court to assume jurisdiction in a case in which the state sought to enjoin tribal bingo gaming on tribal lands.[4] The Tenth Circuit Court subsequently enjoined the lower state court in Oklahoma from applying or enforcing the Oklahoma Supreme Court's flawed analysis. *Seneca-Cayuga Tribe v. State, ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989).

The Oklahoma Court remained somewhat passive in this area of Indian law for about ten years. However, the Court again embarked on its efforts to unilaterally redefine and narrow the doctrine in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okl. 1995), Cert. denied ___ U.S. ___, 116 S.Ct. 1675, 134 L.Ed.2d. Relying on a lone decision by the New Mexico Supreme Court, *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), Cert. denied 490 U.S. 1029, and misapplying decisions of this Court which had nothing to do with the application of tribal sovereign immunity from unconsented suit, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Nevada v. Hall*, 440 U.S. 410 (1979), the Court said that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country". (*Id.* at 62)

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[4] The decision reversed the district court's finding that tribal immunity from suit deprived it of subject matter jurisdiction.

Three months later, the Court in *First National Bank in Altus v. Kiowa*, 913 P.2d 299 (Okl. 1996) declared *Hoover* to be dispositive on the bank's right to sue the tribe on a promissory note in state court. As noted in the dissent, the Court ignored a recent decision of the Tenth Circuit, *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1064 (10th Cir. 1995) which held that the doctrine of tribal immunity from unconsented suit in state court applies even if it " . . . results from commercial activity occurring off the Nation's reservation".

In *Aircraft Equipment v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (Okl. 1996) the Oklahoma Court, to emphasize its determination to whittle away at sovereign immunity, cited *Hanson* in a case having the same issue, but opined " . . . that a federal court's pronouncement on a *state law question* lacks the force of authority in that it cannot bind this Court". (Emphasis supplied) Apparently, the dissenters becoming increasingly alarmed, warned that the " . . . majority opinion contravenes the mainstream of contemporary sovereign immunity jurisprudence" and found it " . . . regrettable that this Court chips away at the long established sovereignty of the tribes". (J. Summers, 921 P.2d at 362-363)

With this trilogy of misguided decisions by Oklahoma's highest court, the Court of Appeals obviously felt that, in the instant case, it had no choice but to follow them, saying "[A]s the law now exists in Oklahoma, there appears no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding". (Pg. 4, Ct. of Appeals Opinion, App. to Pet. for Cert.)

Precisely because the Constitution has entrusted the federal government with exclusive authority to regulate relations with Indian tribes, the Oklahoma Supreme Court was prohibited under the Supremacy Clause of the Constitution, Article VI, Clause 2, from ignoring and rejecting the binding precedent established by the Tenth Circuit Court of Appeals in *Hanson*. *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986); *Howlett By and Through Howlett v. Rose*, 496 U.S. 367 (1990)[5] Federal Courts, and not state courts, are the final arbiters on the scope of federal laws and federal rights. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Likewise, the Supremacy Clause requires state court judges – even those of a state supreme court – to determine and apply federal law when deciding a federal question. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law"); *Heck v. Humphrey*, 512 U.S. 477 114 S.Ct. 2364, 2373, n.9 (1994) ("State Courts are bound to apply federal rules in determining the preclusive effect of federal court decisions on issues of federal law").

The Alaska Supreme Court in *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977) enunciated the rule in a manner that befits this case:

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[5] The Supremacy Clause provides that "[t]his Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding."

> "The Supremacy of the decisions of the Supreme Court of the United States has been recognized since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 4 L.Ed. 97 1816. Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case.

There is no doubt that the Oklahoma Court has it wrong when it says in *Aircraft Equipment* that this is a "state law question". The law is absolutely clear that the scope of tribal sovereign immunity is exclusively a matter of federal law. (Tribal immunity from suit " . . . is subject plenary federal control and definition"). (*Wold Engineering* at 891) (" . . . Tribal immunity . . . governed by federal law". *Graham* at 841) supra.

CONCLUSION

The Oklahoma Supreme Court has impermissibly embarked on a mission to redefine and supplant an important and long-standing federal policy for Indian tribes with that of the State of Oklahoma. In *Aircraft Equipment*, at 362, the Court unabashedly said it was applying state public policy to " . . . protect[s] all of our citizens including tribes who voluntarily choose to do business with their fellow Oklahoma citizens"[6] Such a crushing blow to an essential aspect of tribal sovereignty

[6] While perhaps not intended, this otherwise cavalier designation of the Tribes as "fellow citizens of Oklahoma" may be an insight into the State's misguided perspective as to tribal sovereignty.

is unnecessary and, indeed, overkill. Amici do not condone deliberate breach of valid contracts under the protection of immunity from suit. However, there is a simple method in avoidance of this for the non-Indian party, i.e. require a waiver of sovereign immunity clause in the contract. It is done everyday all over this country by persons and firms doing business with Indian tribes. The Amici tribes have several agreements and compacts with the State of Oklahoma and non-Indian business entities with limited waivers of immunity approved by their governing bodies. As a corollary, no prudent business interest would dare enter into a business venture or contract with a state government, the United States government, or that of a foreign country without first determining how it could enforce its contractual rights.

The Courts of Oklahoma have amply demonstrated that they will take license with federally conferred tribal rights. Unless this Court strikes down this effort to limit tribal immunity, this instance will only be the tip of the iceberg. Amici urges the Court to protect this important aspect of their sovereignty and overrule the Oklahoma Appellate Courts.

Respectfully submitted,

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